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October Term, 1997

NATIONAL ENDOWMENT FOR THE ARTS, *et al.*,
Petitioners,

vs.

KAREN FINLEY, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF AMICUS CURIAE FOR THE ROCKEFELLER FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

The Rockefeller Foundation ("the Foundation") brings a unique perspective to its role as an *amicus curiae* in this case.[1] The Foundation does not accept funds from the National Endowment for the Arts (NEA). Rather, it is a private charitable organization that, like the NEA, supports the arts by funding artists and arts organizations (often on a co-funding basis with the NEA).

Although the Rockefeller Foundation receives no funding from the NEA, the Foundation has a keen interest in federal arts policy generally, and 47 U.S.C. § 954(d)(1) (the "decency and respect" provision) in particular, because of the effects that provision will have on the development of our culture. For decades, the Foundation has been a leading private supporter of the arts, spending more than $125 million on the arts from 1965 to 1997. The Foundation has contributed to the cultivation of new work in theater, opera, music composition, choreography, and visual arts. The Foundation has also encouraged the creation of newer media directions for artists, such as film and video, alternative art spaces and festivals, and performance art, as well as cross-cultural collaborations and exchanges. In supporting these efforts, the Foundation has always placed special emphasis on supporting meritorious art that is so daring that it may prove too controversial for commercial purposes. The Foundation does so because of its conviction that modern society will be importantly inspired and interpreted through the most advanced ideas of creative individuals -- however unconventional those ideas might be.

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[1]The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amicus* represents that counsel for the parties did not author the brief in whole or in part, and, that no entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

The NEA's enforcement of the "decency and respect" restriction in its own funding decisions will significantly constrain the efforts of the Foundation, others who support the arts, and the overall creative community. That is because combinations of public and private support are the norm for most artistic initiatives, and it is rare for any one funder to provide all the funding necessary for a particular artistic undertaking. Over the past three decades the Foundation and the NEA have collaborated to fund hundreds of projects and initiatives. The Foundation's experience in this regard is typical of the arts funding process generally. Thus, restrictions on the NEA's funding decisions will have wide effects indeed.

The NEA collaborates with private organizations such as the Foundation in three basic ways. First, the Foundation enters into partnerships with the NEA that are jointly designed, managed, and funded by both organizations. Since 1987, for instance, the Foundation has acted together with the NEA, the United States Information Agency, and The Pew Charitable Trusts to create, support and manage the Fund for U.S. Artists at International Festivals and Exhibitions, a partnership established to foster an expanded role for American artists in international festivals and exhibitions. Jointly administered partnerships require exceptionally close cooperation between the NEA and the Foundation, whose officials often meet regularly to set policy for their collective endeavors. Continued NEA participation in these ventures is critical to their survival. For example, the 1994 termination of federal support for the Artists' Projects Regional Initiative (APRI) -- a program created by the NEA and the Rockefeller Foundation, and jointly funded by them along with Andy Warhol Foundation for the Visual Arts -- ultimately led to the demise of the APRI because the NEA previously had provided all necessary administrative infrastructure for the program.

Second, the Foundation collaborates with the NEA on projects that are developed and funded by both organizations but administered through regranting agencies approved by the NEA, the Foundation, and any other funders involved. From 1983 to 1989, for example, the organizations jointly supported OPERA America, a new works program that awarded over 300 grants around the nation to assist in the development of new operas. The Southeastern Center for Contemporary Art (SECCA), a grantee of both the NEA and the Foundation, provided funds to Andres Serrano. A Serrano photograph -- which depicted a plastic crucifix submerged in the artist's urine -- was assailed in Congress as blasphemous and sacrilegious, and ultimately served as a direct catalyst for passage of the "decency respect" clause at issue here. *See Finley v. National Endowment for the Arts*, 100 F.3d 671, 677 n.10 (9th Cir. 1996) (citing 135 Cong. Rec. H3637, H3640 (July 12, 1989)).

Third, the Foundation and the NEA frequently provide direct funding to the same individuals or arts organizations. Over the years, the two groups have joined in hundreds of these informal collaborative efforts, often supporting innovative works that generate substantial debate and controversy. For example, both the NEA and the Foundation funded Bill T. Jones's "Still/Here," a highly contentious interdisciplinary dance work featuring images of people living with AIDS and other life-threatening diseases.[2] The two organizations also jointly funded an exhibition at the Whitney Museum of American Art

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[2] *See, e.g.*, Jan Breslauer, *Mortal combat choreographer Bill T. Jones kicked off a war of words with "Still/Here," an exploration of mortality that some called "victim art,"* L.A. Times, Apr. 23, 1995, at 8 (describing controversy surrounding "Still/Here"); Jane Vranish, *Dancing on the edge: it was a year of risk-taking*, Pitt. Post-Gazette, Dec. 29, 1995, at 15 ("Due to its highly charged material, ['Still/Here'] caused the biggest controversy the dance world has seen in 40 years.").

entitled "Black Male: Representations of Masculinity in Contemporary American Art," which drew intense criticism from diverse perspectives.[3]

At each level of the co-funding relationship, the success of Foundation grants depends on the cooperation of the NEA. Consequently, limits on the agency's discretion to award grants, such as the "decency and respect" provision, will necessarily restrict the Foundation's ability to support artistically worthy projects. This is also true with respect to the other ways in which the Foundation collaborates with the NEA. The limits do so, moreover, in a systematically biased way, by excluding the possibility of funding daring and controversial challenges to conventional mores.

The NEA's dominant position in the national arts community exacerbates the problems inherent in ideologically motivated federal funding decisions. Even with its reduced budget,[4] "the Arts Endowment remains the largest single source

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[3] *See, e.g.*, Hilton Kramer, Black Male*'s Blackmail Raises Foucault's Ghost*, N.Y. Observer, Nov. 21, 1994, at 25 (criticizing exhibit as focusing more on "political outreach" than "artistic quality"); Yasmin Ramirez, *The Whitney Museum on Gender: Half the Picture*, Ms., Nov./Dec. 1994 (arguing that exhibit "underplay[ed] a whole artistic tradition of black women experimenting with notions of 'maleness'"); Deborah Solomon, *Whitney Solves U.S. Race Problem*, The Wall Street Journal, Nov. 11, 1994, at A11 (suggesting that some works in exhibit "perpetuate[d] cheap stereotypes").

[4] Congress has sharply reduced the NEA budget in recent years, and it is unlikely that private arts supporters will be able to make up the difference. *See, e.g.*, NEA, *Guide to the NEA: Strategic Plan* (visited Feb. 2, 1998) <http://arts.endow.gov/Guide/Facts/Myth.html> ("The presumption that private giving will supplant any loss of federal funds is without foundation. . . . Taking away the federal 'seed' money will not encourage arts funding to grow, but just the opposite. Leaders from the philanthropic sector have flatly stated that they would not be able to take up the slack."); Nina Kressner Cobb, President's Committee on the Arts and the Humanities, *Looking Ahead: Private Sector Giving to the Arts and the Humanities* 33 (1996) ("[I]t is clear that with increased demands on their limited resources, private foundations will not be able to replace federal funds."); *id.* at 20 (quoting foundation official's statement that "it is absurd to think that the philanthropic sector can fill the funding gap.").

of national leadership and support for the arts in America." NEA, *Guide to the NEA: Strategic Plan* (visited Feb. 2, 1998) <http://arts.endow.gov/Guide/Strategic/Intro.html>. The NEA stimulates private arts assistance through a combination of explicit matching requirements -- which typically provide that NEA funding for a particular project will match a given proportion of that raised from private or public sources -- and indirect influence. The agency's efforts in this regard have produced extraordinary results, leveraging nearly ten dollars in private support for every one dollar in federal arts contributions.[5]

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[5] Testifying before Congress in 1994, former NEA Chairperson Jane Alexander stated: "Endowment grants serve as a major catalyst for leveraging nonfederal support. In FY 93, for example, Endowment grants of about $120 million generated matching funds estimated at $1.1 billion, a ten-fold match." Department of the Interior and Related Agencies Appropriations Act, 1995, Hearings on H.R. 4602, Before the Subcomm. on Interior and Related Agencies of the House Comm'n on Appropriations, 103d Cong. 297 (Apr. 20, 1994) (testimony of Jane Alexander, NEA Chairperson). *See also, e.g.*, NEA, *Guide to the NEA: Strategic Plan* (visited Feb. 2, 1998) <http://arts.endow.gov/Guide/ Facts/Tenfacts.html> ("One Endowment dollar attracts many more dollars for the arts from state, regional and local arts agencies, foundations, corporations, businesses and individuals."); NEA, *Arts in America 1990: The Bridge Between Creativity and Community* 9 (1990) (estimating that in 1989, $119 in federal grants generated over $1.36 billion in private funds).

Political involvement in federal funding impedes the free flow of artistic ideas even where the NEA plays no direct funding role. Because of the scarcity of public and charitable arts support, artists and arts organizations will steer clear of potentially controversial initiatives, even in non-NEA projects, for fear of jeopardizing future applications to the NEA or private regranting institutions. Those institutions, in turn, will avoid any contact with experimental artists to ensure continued support from the NEA on future projects. This is no mere theoretical possibility. In the early stages of the controversy over Robert Mapplethorpe's NEA-supported photography, for example, the threat of congressional disapproval drove the Corcoran Gallery of Art in Washington, D.C., to cancel a planned exhibit of the artist's work.[6]

Furthermore, because of the NEA's reputation in the art world, agency funding decisions reverberate long after grantees make use of federal funds. NEA awards confer an imprimatur of quality on an artist or organization, significantly improving the grantee's chances of securing outside funding in the future. As the President's Committee on the Arts and Humanities explained,

> There is a clear parallel between the federal investment in culture and the willingness of corporations, foundations and individuals to support cultural activity. . . . The overwhelming evidence is that the federal 'imprimatur,' or 'seal of approval' as it is often called, convinces other funding sources to contribute. The federal agencies establish national merit-review procedures that

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[6]*See, e.g.*, Barbara Gamarekian, *Corcoran, to Foil Dispute, Drops Mapplethorpe Show*, N.Y. Times, June 14, 1989, at C22.

> demonstrate that a proposal has passed rigorous evaluation -- a review many corporate and foundation officials take into serious consideration.

President's Committee on the Arts and Humanities, *Creative America: A Report to the President* 24 (Feb. 1997).[7] Conversely, when the agency rejects a grant application on the basis of the proposal's purportedly "indecent" or "disrespectful" nature, the stigma can be devastating.

Although these concerns affect all private charitable organizations, they are particularly troublesome for the Rockefeller Foundation, which is committed to encouraging new and daring art that might not attract other funding because it is unfamiliar, novel, or even controversial. The pervasive chilling effect of the challenged provision likely will strike hardest at experimental art, as needy artists and art organizations attempt to conform their artistic expression to the government's notions of "decency and respect."[8] In light of the

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[7]*See also, e.g.*, Nina Kressner Cobb, President's Committee on the Arts and the Humanities, *Looking Ahead: Private Sector Giving to the Arts and the Humanities* 19 (1996) ("An important indicator of the catalytic role that NEA plays is the degree to which prior or contemporaneous NEA support of a program is taken into account by private funders in evaluating applications for funding. Most program officers at foundations with arts programs view the receipt of an NEA grant as a sign that an organization has attained a level of sound organization structure and/or artistic excellence."); *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 783 (C.D. Cal. 1991) ("NEA grants lend prestige and legitimacy to projects and are therefore critical to the ability of artists and companies to attract non-federal funding sources.") (citation omitted).

[8]According to Charlotte Murphy, Executive Director of Respondent National Association of Artists' Organizations (NAAO), NAAO members are "afraid that the 'general standards of decency' requirement will bar them from

practical realities of arts funding, artists may feel compelled to forsake their natural creative impulses in favor of blander, more homogenous projects. Similarly, the threat of NEA sanctions will lead museums and other arts institutions to distance themselves from innovative, controversial works.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a First Amendment challenge to 20 U.S.C. § 954(d)(1), which requires the NEA to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public" when judging arts grant applications. NEA enforcement of the "decency and respect" restriction substantially threatens the "climate encouraging freedom of thought, imagination, and inquiry" that it is the NEA's statutory mission to foster, 20 U.S.C. § 951(7), and the First Amendment's central function to protect. The widespread creation and dissemination of artistic expression depends on philanthropic support. As demonstrated above, private and public sources of that support are inextricably linked in myriad ways. Restrictions applicable to NEA funding will reverberate through the entire process of arts funding, and will significantly inhibit the creative choices of the many artists

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receiving NEA funding" because "new and contemporary art of the type presented or created by many NAAO members is by definition often provocative and threatening to traditional or conservative values or notions of morality." J.A. 21-22.

These groups already bear the brunt of nationwide reductions in art support. *See, e.g.*, Nina Kressner Cobb, President's Committee on the Arts and the Humanities, *Looking Ahead: Private Sector Giving to the Arts and the Humanities* 5 (1996). ("Small, innovative and community-based arts organizations will lose the most in the competition for private dollars and declining public funds.").

dependent on such funding. This case, therefore, is about much more than the rights to self-expression of the Respondents in the present dispute, or even of NEA grantees generally -- important as those rights are. Ultimately, this case is about whether our nation's cultural life will be characterized by a commitment to the uninhibited, robust, and wide-open exchange of ideas, or will instead be hedged-in, distorted, and homogenized by the Government's efforts to discriminate against daring and controversial artistic challenges to conventional mores and beliefs.

The "decency and respect" restrictions of 20 U.S.C. § 954(d)(1) are unconstitutional because "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1994) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). Viewpoint discrimination is intolerable because "each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence," free of government efforts to "manipulate the public debate." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994). As the Court has recognized, "[o]ur political system *and cultural life* rest upon this ideal." *Id.* (emphasis added). Had Congress enacted a law expressly forbidding the NEA from funding any artistic endeavor that portrayed homosexuality favorably or religion unfavorably, such a provision would be subject to "the most exacting scrutiny" (and certainly invalidated) because it attempts to "suppress [or] disadvantage" speech based on the views espoused. *Id.* at 642. But § 954(d)(1) is, in substance, just such a law. Congress adopted it in the wake of controversies over NEA funding of artistic expression by Robert Mapplethorpe and Andres Serrano that was vociferously

attacked as indecent and disrespectful of traditional values. The amended law tilts the scales against sucn art. In other words, it instructs the NEA to withhold otherwise generally available funding for meritorious art precisely when a work has "strong communicative content, protesting conventional norms or giving an edge to a work by conveying otherwise inexpressible emotions." *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2416 (1996) (opinion of Kennedy & Ginsburg, JJ.) (internal quotation marks and citation omitted). Such a law offends the First Amendment's core principles.

Congress has no more power to discriminate against unconventional views when it is funding private expression than when it is restricting private expression directly. To the contrary, ideologically driven attempts to suppress a particular viewpoint are presumptively unconstitutional in all contexts. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). To be sure, when the government speaks -- either directly or through others -- it may choose the message. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 194 (1991). But, as the Government concedes, NEA grants do not act as a vehicle for conveying a particular government message. Petitioners' Brief at 35. Rather, NEA subsidies are expressly intended to encourage a diversity of thought and expression, much like government's funding of a public university or creation of a public forum. Consequently, because the NEA grant-making scheme facilitates a broad range of private art speech, the First Amendment prohibits Congress from restricting NEA funds in a way that discriminates on the basis of a recipient's viewpoint.

This neutrality mandate is made even more imperative by NEA's central position in the art world, because the NEA's ideologically-based funding decisions will have a widespread impact on the free exchange of artistic ideas across the nation. Public-private partnerships will no longer be possible respecting a broad range of programs and projects that NEA may deem too unconventional or shocking. Individual artists and arts organizations will shy away from art challenging conventional norms, to avoid putting their future eligibility for NEA funds at risk. These pressures to conform are made more intense by the reputation-enhancing quality of an NEA grant. Because the imprimatur of such a grant can make all the difference in the career of an artist or the stature of an arts organization, the "decency and respect" provision creates powerful incentives to steer clear of daring or challenging perspectives. Such widespread chilling effects are utterly inconsistent with the First Amendment's commitment to uninhibited, robust, and wide-open debate.

ARGUMENT

I. THE NEA GRANT-MAKING SCHEME DEMANDS GOVERNMENT NEUTRALITY

A. Because it encourages a diversity of views from private speakers in a traditional sphere of free expression, the NEA grant-making process demands government neutrality.

Artistic speech enjoys full First Amendment protection. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975) (theater); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (film). Art is thus

constitutionally shielded not only from outright government suppression, but also from discriminatory funding practices.

In the context of government subsidies, as with speech regulation generally, the prohibition on viewpoint discrimination lies at the heart of the First Amendment. *See, e.g.*, *Rosenberger*, 515 U.S. at 828 ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("'[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject.'" (quoting *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 805 (1985))); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548 (1983) (noting that the government may not "discriminate invidiously in its subsidies in such a way as to aim[] at the suppression of dangerous ideas") (internal quotation marks and citation omitted).

Whether viewpoint discrimination in government funding violates the First Amendment depends on the nature of the subsidy program at issue. In certain instances, when the government itself "is the speaker or when it enlists private entities to convey its own message," *Rosenberger*, 515 U.S. at 833, the state has greater leeway to limit the viewpoints expressed by subsidized speech. *See, e.g.*, *Rust*, 500 U.S. at 194 (upholding speech restrictions on federal family planning program using private speakers to advance governmental goals). Commissioned works of art designed to commemorate national historic figures or events, for example, may properly be confined in their message and scope. But "when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a

diversity of views from private speakers," *Rosenberger*, 515 U.S. at 834, the First Amendment forbids viewpoint-based restrictions. Furthermore, as the Court recognized in *Rust*, strict neutrality should be required for government subsidies in "traditional sphere[s] of free expression," such as public universities and public fora. *Rust*, 500 U.S. at 200.

Through the NEA grant-making process, Congress has encouraged the dissemination of a diversity of creative ideas in a traditional sphere of free expression. As the Court of Appeals correctly concluded, "the arts, no less than the university, are 'at the core of a democratic society's cultural and political vitality.'" *Finley*, 100 F.3d at 682 (quoting *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1473 (C.D. Cal. 1992)). Indeed, recognition of art's fundamental importance to a free, vibrant national community underlay the establishment of the NEA. The Senate Report accompanying the agency's creation, for example, emphasized that the arts "'are at the center of our lives and are of prime importance to the Nation and to ourselves. . . . Very simply stated, it is in the national interest that the humanities and arts develop exceedingly well.'" S. Rep. No. 89-300, at 7 (1965) (quoting statement of Dr. Barnaby C. Keeney, Chairman of the Comm'n on the Humanities); *see also, e.g.*, 20 U.S.C. § 951(10) ("It is vital to a democracy to honor and preserve its multicultural artistic heritage. . . .").

In creating the NEA, Congress emphasized the need to promote diverse artistic expression unfettered by political biases. The Senate Report's "Freedom of Expression" section, for instance, stated that the intent of the NEA's enabling legislation "should be the encouragement of free inquiry and expression," and that "no undue preference should be given to any particular style or school of thought or expression." S.

Rep. No. 89-300, at 4. (1965). Similarly, the statute's "Declaration of findings and purposes" stressed that the "Federal Government [should] help create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry."[9] 20 U.S.C. § 951(7). These principles of neutrality have remained central to the NEA's mission over the years, as confirmed in a 1985 House Report suggesting that the NEA's funded programs "should be open and richly diverse, reflecting the ferment of ideas which has always made this Nation strong and free." Arts, Humanities and Museums Amendments of 1985, H.R. Rep. No. 99-274, at 13 (1985).

Having created a program to subsidize a vast range of private expression, Congress cannot categorically exclude from that benefit persons or works with controversial or unpopular viewpoints. In light of the paramount importance of free artistic expression in our democratic society, and in view of the NEA's role in fostering richly diverse artistic endeavors, the NEA's funding procedures must conform to the strictures of viewpoint neutrality.

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[9]*See also, e.g.*, 111 Cong. Rec. 23665 (1965) (statement of Rep. Annunzio) ("Government support of the arts and humanities is not to replace private initiative, reduce private responsibility, or restrict artistic freedom."); *id.* at 23963 (statement of Rep. Monagan) (noting purpose of NEA to provide "Government assistance, but not intervention . . . support but not control . . . stimulation but not participation.").

B. The fact that the NEA must evaluate grant applications on the basis of their artistic merit does not permit the NEA to deny those applications because of government's disapproval of their viewpoint.

Although it is conceded that NEA grants do not constitute the government's "own speech," *Rosenberger*, 515 U.S. at 834, and do not convey a "governmental message," *id.* at 833, Petitioners' Brief at 35, the NEA nonetheless argues that viewpoint neutrality cannot be required in a subsidy arena in which the government already makes certain content-based judgments, i.e., those based on artistic merit. This argument, however, ignores the distinction between permissible content-based decisions that promote the essential functions of a "traditional sphere of free expression," and prohibited viewpoint-based restrictions that are, at best, incidental to a subsidized program's primary purpose.

In the related context of public education funding, this Court consistently has drawn a clear line between allowable, and even necessary, judgments that advance an institution's academic goals, and unconstitutional viewpoint-based determinations unrelated to the educational mission. For instance, the Court has emphasized that while school boards "rightly possess significant discretion to determine the content of their school libraries[,] . . . that discretion may not be exercised in a narrowly partisan or political manner." *Board of Educ. v. Pico*, 457 U.S. 853, 870 (1982) (plurality opinion). Similarly, although a state can provide funding to hire public university professors on the basis of academic criteria, it cannot condition employment on factors unrelated to the educational mission, thereby "cast[ing] a pall of

orthodoxy" over its schools. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).[10]

As in the educational setting, the fact that the NEA distributes art subsidies according to artistic merit does not give the agency license to favor one set of viewpoints or perspectives over another. Just as schools may limit public subsidies to speech that is "related to . . . educational purpose[s]," *Rosenberger*, 515 U.S. at 824, the government properly may apply aesthetic criteria in arts funding. It is not inherently illegitimate for the government to make aesthetic judgments that are viewpoint-neutral. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981) (regarding aesthetics as "substantial governmental goal[]"); *Miller v. California*, 413 U.S. 15, 24 (1973) (distinguishing, for obscenity law purposes, works that have "serious" artistic value); *Serra v. United States Gen. Servs. Admin.*, 847 F.2d 1045, 1051 (2d Cir. 1988) (observing that "the state may regulate the display and location of art based on its aesthetic qualities"). The application of neutral standards aimed at promoting the NEA's artistic mission, however, does not permit the agency to ignore long-standing constitutional proscriptions against viewpoint discrimination. *See, e.g., Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (noting that, while aesthetic restrictions are permissible, "the First Amendment forbids the government

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[10]Likewise, subsidies for the press, another "sphere of free expression," also demand strict neutrality. *See, e.g., Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (noting that selective allocation of benefits to the press "is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints"); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987) (invalidating discriminatory subsidization of the press through tax exemption).

to regulate speech in ways that favor some viewpoints or ideas at the expense of others").

In suggesting that the NEA's exercise of artistic discretion over its limited funds overrides the First Amendment's prohibition on viewpoint discrimination, the Government disregards *Rosenberger's* discussion of resource scarcity. This Court in *Rosenberger* squarely addressed and rejected the notion that economic scarcity can justify non-neutral subsidization. *Rosenberger*, 515 U.S. at 835. In the face of such limitations, the Court explained, the state cannot favor particular ideas or schools of thought but must instead allocate available resources based "on some acceptable neutral principle." *Id.* Through the establishment of the NEA, Congress has done just that by distributing funds on the viewpoint-neutral criteria of artistic merit and excellence.

C. The NEA's mission in encouraging free inquiry and expression is consistent with the complex nature of artistic speech.

Petitioners argue that because some art may lack a single "express message," Congress could not have intended the NEA to serve as a vehicle for the free exchange of ideas. Petitioners' Brief at 30-31 & n.9. This contention is flawed in several respects.

First, neither case law nor logic support Petitioners' suggestion that the mere presence of some ambiguous speech in a government-subsidized program will overcome the state's otherwise clear intent to encourage diverse private expression. If that were the case, then the fact that a public university library contained, for example, a dictionary or a mathematics textbook -- neither of which are "communicative in the same

sense as conventional speech on matters of public concern," Petitioners' Brief at 30 -- would strip the library of its protection from viewpoint discrimination. Similarly, under the Petitioners' view, the inclusion of an apolitical student "entertainment" group in the University of Virginia's reimbursement program in *Rosenberger*, 515 U.S. at 824, would preclude this Court's determination that the University intended to facilitate free private expression. Surely, *Rosenberger's* teachings cannot be so rigidly applied as to remove the neutrality mandate any time some subsidized speech fails to advance a "single, identifiable message." Petitioners' Brief at 30-31.

Second, Petitioners' argument misperceives the constitutional value of art speech. Artistic expression is unique in its ability to inspire a host of intellectual, interpersonal, and spiritual responses. Art speech is thus vital to the First Amendment because, in addition to advancing straightforward, singular messages,[11] art's creative, often imprecise nature affects audiences in ways mere words cannot. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (explaining that nonpolitical speech that entertains may "affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression"); *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996) ("The ideas and concepts embodied in visual art have the power to transcend . . . language limitations and reach beyond a particular language group to both the educated and the

[11]Petitioners concede that art, as with other forms of speech, can express distinct, readily identifiable ideas. *See* Petitioners' Brief at 30 n.9 ("To be sure, many art forms -- most obviously, literature and theatrical arts -- may convey more explicit linguistic or symbolic messages.").

illiterate. . . . [V]isual images are 'a primitive but effective way of communicating ideas . . . a short cut from mind to mind.'" (quoting *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943))), *cert. denied*, 117 S. Ct. 2408 (1997).

Repressive regimes historically have viewed the persuasive power of artistic expression as a threat. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known [music's] capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state."). Because of the same insights, Congress has, through the NEA, recognized art speech as "vital to a democracy." 20 U.S.C. § 951(10).

Having "expended funds to encourage a diversity of views from private speakers," *Rosenberger*, 515 U.S. at 834, Congress cannot now escape the neutrality mandate so crucial to the vitality and integrity of this "traditional sphere of free expression," *Rust*, 500 U.S. at 200.

II. THE "DECENCY AND RESPECT" PROVISION IMPOSES UNCONSTITUTIONAL VIEWPOINT-BASED RESTRICTIONS ON NEA GRANTS

The "decency and respect" clause unconstitutionally discriminates against artists and art organizations on the basis of their viewpoint.

A. On its face, the "decency and respect" provision imposes impermissible viewpoint-based criteria on NEA grants

The "decency and respect" amendment is facially discriminatory against particular views and perspectives. Most problematically, it requires the NEA to consider whether an applicant demonstrates "respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d)(1). Regardless of artistic merit, a work may be denied federal funding simply because of a perceived "disrespect" for American beliefs and values. In many cases, this prohibition can serve to silence expressly political viewpoints, as in the flag example offered by the Court of Appeals. *See Finley*, 100 F.3d at 683.

The "respect" requirement can also facilitate the elevation of one religious art perspective over another, an even more egregious form of viewpoint discrimination than that invalidated in *Rosenberger*. Take, for example, Andres Serrano's "Piss Christ," the likes of which the "decency and respect" clause was specifically designed to screen out. Because of its apparently[12] "disrespectful" message -- in the words of Senator Jesse Helms, the "denigrati[on] of our Lord, Jesus Christ," 136 Cong. Rec. S18002 (October 24, 1990) -- the work presumably would be denied funding under the amended NEA statute. On the other hand, the "respect"

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[12]As is often the case, Serrano's intentions were not as neatly and easily defined as his critics would believe. *See, e.g.*, Associated Press, *Immersing Christ in urine an attempt to humanize him, says artist*, AP Worldstream, Oct. 10, 1997 (according to Serrano, "'Piss Christ' is a representation of the pain and suffering Christ underwent for all of us. My use of fluids like blood or urine is a way of humanizing him and identifying with his indignity and sorrow.").

restriction would not reach -- indeed, could not reach under *Rosenberger*, 515 U.S. at 831-32, and *Lamb's Chapel*, 508 U.S. at 394-95 -- a photograph with an overtly pro-religious viewpoint. Thus, the "respect" clause impermissibly targets "[t]he prohibited perspective" of an anti-religious message, "not the general subject matter"of religion. *Rosenberger*, 515 U.S. at 831. If, as *Rosenberger* has taught, the government may not silence "an entire class of [religious] viewpoints," *id.*, then surely it cannot target for exclusion one distinct, narrow, minority position on the subject.

The "decency" limitation, read in conjunction with the "respect" clause, also operates to stifle a particular set of artistic viewpoints. The shocking character of speech may be inextricably linked to its message. *See, e.g., Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2415-16 (1996) (Kennedy & Ginsburg, JJ., concurring in part, concurring in the judgment in part, dissenting in part) ("In artistic or political settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying otherwise inexpressible emotions. . . . Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with the loss of truth or expressive power.") (internal quotation marks and citation omitted); *Cohen v. California*, 403 U.S. 15, 26 (1971) ("We cannot sanction the view that the Constitution . . . has little or no regard for [the] emotive function [of vulgar speech] which, practically speaking, may often be the more important element of the overall message sought to be communicated.").[13] For that

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[13]As noted in the Senate Report accompanying the NEA's enabling statute, "One of the artist's and humanist's great values to society is the mirror of self-examination which they raise so that society can become aware of its

reason, the regulation may silence the perspectives of artistically worthy artists or organizations that seek to challenge conventional thought and accepted beliefs.[14]

Stripped of the ability to challenge, question, and confront traditional beliefs and practices, art speech will begin to lose its cultural and political relevance. The First Amendment forbids this result. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) ("[A] principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs

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shortcomings as well as its strengths." S. Rep. No. 89-300, at 3 (June 8, 1965); *see also, e.g., American Council of the Blind v. Boorstin*, 644 F. Supp. 811, 814 (D.D.C. 1986) (invalidating as viewpoint discrimination Librarian of Congress's decision to stop funding braille translation of Playboy magazine because of "sexual orientation of the magazine").

[14]Petitioners' reliance on *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), and *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), as support for the NEA's broad authority to restrict "offensive" speech, Petitioners' Brief at 39-40, is misplaced. In upholding the broadcast regulation in *Pacifica*, this Court identified a number of key factors not present here, including the special nature of broadcast media, the potential intrusion of the offensive speech into the home, and the fact that the regulation only applied during times when children might hear the broadcast. *Pacifica*, 438 U.S. at 748-50; *see also Reno v. ACLU*, 117 S. Ct. 2329, 2342-43 (1997) (invalidating ban on "indecent" material on Internet, and distinguishing "'emphatically narrow holding' in *Pacifica*" (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989))). Similarly, the decision in *Bethel* rested on the fact that the regulated speech at issue was presented at an assembly to "children in a public school," and not to "adults in [an]other setting[]." *Bethel*, 478 U.S. at 682 (distinguishing *Cohen v. California*, 403 U.S. 15 (1971)).

Most importantly, the regulations on "indecent" speech in *Pacifica* and *Bethel* were not nearly as broad as the NEA rule challenged here, as they contained no requirement of conformity to promote "respect for the diverse beliefs and values of the American public."

people to anger.'" (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949))).

B. The history of the "decency and respect" provision indicates clear congressional intent to target unpopular viewpoints.

A brief examination of the legislative history of the "decency and respect" provision confirms its viewpoint-discriminatory character. Prior to 1989, the NEA had judged grant applications solely on the basis of artistic merit. However, in the furor over several controversial photographs by Robert Mapplethorpe and Andres Serrano displayed with the support of NEA funds, Congress sought to amend the agency's authorizing statute. In floor debates concerning various proposed amendments, Congress expressed its unmistakable displeasure with the perceived messages conveyed by the controversial art. *See, e.g.*, 136 Cong. Rec. S18002-3 (Oct. 24, 1990) (statement of Sen. Helms) (expressing outrage that Serrano "went out of his way to insult the Christian community"); 135 Cong. Rec. H3581 (July 12, 1989) (statement of Rep. Kasich) (condemning "such scurrilous attacks on religious beliefs").[15] Congress passed the "decency and respect" amendment in 1990 after being stymied in its attempt to add an "obscenity" provision to the statute a

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[15]*See also, e.g.*, 136 Cong. Rec. H9410 (Oct. 11, 1990) (statement of Rep. Coleman) ("Works which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds."); 136 Cong. Rec. H9439 (Oct. 11, 1990) (statement of Rep. Dornan) ("Serrano's loathsome picture of Christ was both blasphemous and bigoted.").

year earlier.[16] Given the political climate in which the new provision arose, it is not surprising that Representative Henry characterized the "decency and respect" clause as "a shell, a screen, *a viewpoint* that must be constantly taken into account" in dispensing NEA grants. 136 Cong. Rec. H9417 (Oct. 11, 1990) (statement of Rep. Henry) (emphasis added).

Petitioners attempt to cast the "decency and respect" requirement as an unremarkable clarification of standards that "necessarily inhere in the evaluation of . . . 'artistic excellence' -- and especially . . . 'artistic merit.'" Petitioners' Brief at 45. This position, however, contradicts the clear legislative history described above, completely ignoring the political climate in which Congress passed the 1990 amendment. Furthermore, Petitioners' claim clashes with well-settled rules of statutory construction, for the "decency and respect" clause would be superfluous if the new criteria already figured into the statute's "artistic merit" calculus. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("[C]ourts should disfavor interpretations of statutes that render language superfluous.").

C. Enforcement of the "decency and respect" provision will have a devastating chilling effect on private artistic speech.

The government's use of viewpoint-based criteria to subsidize private speech threatens core First Amendment principles by "chilling . . . individual thought and expression." *Rosenberger*, 515 U.S. at 835. This danger is particularly acute in the context of the arts, where, as in the university

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[16] The "obscenity" provision was ultimately declared unconstitutional in *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 785 (C.D. Cal. 1991).

setting, "the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Id.*

The NEA's dominant role in national arts funding magnifies the chilling problem. *Cf. Bella Lewitzky*, 754 F. Supp. at 783 (C.D. Cal. 1991) ("[T]he chilling effect caused by the [obscenity] certification provisions is exacerbated by the practical realities of funding in the artistic community."). Because NEA funding policy substantially affects an overwhelming amount of public and private arts activity in the United States, it is even more essential that the agency remain neutral in dispensing federal arts subsidies. As noted above, the NEA exerts a pervasive influence in the art world that extends far beyond the dollar amounts involved in direct federal grants. In light of the interdependent structure of arts funding in the United States and the NEA's immense influence within that system, federal arts policy has an enormous impact on individual artists, local arts organizations, state arts agencies, and private supporters such as the Rockefeller Foundation. Ideologically based restrictions on NEA grants thus will have a profoundly stifling impact on the national marketplace of artistic ideas.[17] In this context, the First Amendment's neutrality mandate must operate with particular vigilance and force.

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[17] *See, e.g.*, Donald W. Hawthrone, *Subversive Subsidization: How NEA Art Funding Abridges Private Speech*, 40 U. Kan. L. Rev. 437, 439 (1992) ("As long as the NEA retains its dominant role in the art world, the only constitutionally acceptable course for the NEA is to fund art on the basis of quality criteria and professional standards; for only these criteria and standards will ensure that government subsidization does not subvert our constitutional commitments.").

Enforcement of the "decency and respect" clause will channel private artistic speech, even in non-NEA projects, away from challenging, provocative works. In order to avoid the substantial practical consequences of NEA disapproval, artists will compromise their aesthetic integrity and produce more staid, conventional, and unremarkable art. Far from "encouraging freedom of thought, imagination, and inquiry," 20 U.S.C. § 951(~~7~~), then, the NEA will serve as means for preserving the status quo, muting unorthodox artistic voices at the expense of basic First Amendment principles. *See, e.g., West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is a fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.").

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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